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Supreme Court of the United States

OCTOBER TERM, 1952

No......

H. GERTRUDE HOGAN,
Petitioner
(Respondent below),

vs.

CITY OF MIAMI BEACH,
Respondent
(Petitioner below).

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF FLORIDA,

TO THE HONORABLE FRED M. VINSON,
Chief Justice of the United States,
and Associate Justices of the
Supreme Court of the United States:

Your Petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner here, H. GERTRUDE HOGAN, was respondent in the Supreme Court of Florida, and was plaintiff in the Circuit Court of Dade County, Florida.

Petitioner filed her complaint in equity against the City of Miami Beach, a Florida municipal corporation in the Circuit Court of Dade County, Florida, on April 29, 1952. (R. p. 3).

In her complaint, she alleged that she was the owner of an ocean-front residential estate in the City of Miami Beach, Florida, on which was located an elaborate fifty-room residence and appurtenant structures, whose replacement value was approximately $500,000.00. (R. p. 5). Her property was zoned in the "R-AA estate district," permitting her to use it only for single-family residential use, and requiring a lot area of not less than 40,000 square feet per family under the zoning ordinance (City of Miami Beach Ordinance No. 289) which was adopted December 3, 1910. (R. pp. 5 and 6).

Petitioner alleged that her property was no longer suitable for, or in demand for, single-family residential purposes, because of the phenomenal growth of the City, rezoning of neighboring properties for hotel purposes in the recent past, and other reasons. (R. pp. 7 and 12). She alleged that the zoning ordinance was unconstitutional under the Federal and State constitutions, insofar as it affected her property.

Petitioner further alleged that she had formally and informally requested the City Council of Miami Beach to rezone her property to hotel uses, but her request had been summarily and arbitrarily denied. (R. pp. 26 and 27).

Petitioner also alleged that use of her property for uses permitted in the R-E, or hotel district, would not affect the public health, safety, morals or general welfare. R. p. 13).

Petitioner further alleged that the City of Miami Beach, on April 4, 1952, had filed eminent domain proceedings in the Circuit Court in Dade County, seeking to take her property, ostensibly for "public park purposes". Petitioner alleged that these proceedings were illegally initiated, that the ostensible "public park purpose" was not the true purpose thereof, and that said proceedings had been initiated with the deliberate intent of attempting to prevent her from applying for the rezoning of her property. (R. pp. 9-11).

Petitioner's prayer in said complaint is shown in the Record herein filed, at pages 13 to 14. Briefly stated, she prayed that the zoning ordinance be declared unconstitutional as to her property; that the city be enjoined from prohibiting or interfering with the use of petitioner's property for any use permitted in the "hotel district"; that the eminent domain proceedings be stayed pending disposition of this case in equity; and that the city be enjoined from prosecuting said eminent domain proceedings insofar as her property was affected thereby.

The City filed a motion to dismiss this complaint, (R. p. 28), but filed no answer. For the purposes of this motion, the allegations of the complaint were deemed admitted, under Florida law.

The Circuit Court denied the motion to dismiss on July 28, 1952. (R. p. 29).

At a preliminary hearing on July 24, 1952, certain evidence was introduced by petitioner, which is shown at pages 32 to 42 of the Record. The City introduced no evidence.

On July 25, 1952, the Circuit Court ordered the stay of the eminent domain proceedings pending disposition of the equity case. (R. p. 29, 30).

The City took certiorari to the Supreme Court of Florida, complaining of said orders of the Circuit Court. (R. p. 1).

The Supreme Court of Florida granted certiorari, and on January 27, 1953, entered an order quashing the orders of the Circuit Court. (R. p. 42).

Petitioner, on February 10, 1953, applied for a Rehearing in the Supreme Court of Florida, (R. p. 46-52.) On March 26, 1953, the Supreme Court of Florida denied rehearing, and issued its mandate to the Circuit Court. (R. p. 52-53).

In its mandate, the Supreme Court of Florida referred to its opinion filed the same day in the companion case entitled, "City of Miami Beach v. Elsalto Real Estate, Inc." The latter case is similar to this case, and the said opinion is printed in full in the Record herein, at pages 42 to 45. Said Elsalto case is also before the Supreme Court of the United States on petition for certiorari.

This petition for certiorari is for the purpose of obtaining a review of the aforesaid decision and mandate of the Supreme Court of Florida.

II.

STATEMENT OF BASIS OF THIS COURT'S JURISDICTION

A.

This Court's jurisdiction in this cause arises from

the provisions of Section 1257 (3), U. S. C. A., the petitioner claiming that she is being deprived of her property without due process of law by agencies of the State of Florida, contrary to the provisions of the Federal Constitution (Amendment XIV, Section 1).

B.

This petition is applied for within the time limitation set forth in Section 2101 (c), U. S. C. A., the mandate of the Supreme Court of Florida before this Court for review having been issued by the Supreme Court of Florida on March 26, 1953. (Rehearing denied March 26, 1953).

C.

The Supreme Court of Florida is the court of last resort of the State of Florida. Its mandate dated March 26, 1953, is a final judgment or decree, within the meaning of Section 1257, U. S. C. A. (See North Carolina Railroad Co. v. Story, 45 S. Ct. 531, 268 U. S. 288, 69 L. Ed. 959; Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. Ed. 822).

D.

All of the federal questions presented herein were raised either in petitioner's complaint in the trial court, or in petitioner's petition for rehearing in the Supreme Court of Florida, as follows:

Question A. (See paragraph III-A of this petition). This question was raised in petitioner's amended complaint in the trial court, (R. p. 25), with specific reference

to Section 1 of Amendment XIV of the federal constitution. The Supreme Court of Florida ruled adversely to petitioner by its order quashing the lower court order denying a motion to dismiss the complaint. (R. p. 53).

Question B. (See paragraph III-B of this petition.) This question was raised in petitioner's petition for rehearing in the Supreme Court of Florida, (R. p. 47) with specific reference to Section 1 of Amendment XIV of the federal constitution. The Supreme Court of Florida ruled adversely to petitioner by denying said petition for rehearing. (R. p. 52).

Question C. (See paragraph III-C of this petition.) This question was raised in petition for rehearing in the Supreme Court of Florida, (R. p. 47-49), where petitioner specifically called to the attention of said Court that its decision in this case was based on an erroneous application of the "fairly debatable" rule laid down by this Court in Euclid v. Ambler, 71 L. Ed. 303, 47 S. Ct. 114, 272 U. S. 365, and Radice v. New York, 68 L. Ed. 690, 44 S. Ct. 325, 264, U. S. 292, and that its failure and refusal to review the constitutionality of the ordinance involved was contrary to the policy laid down by this Court in Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. Ed. 60. The Supreme Court of Florida ruled adversely to petitioner by denying said petition for rehearing. (R. p. 52).

III.

QUESTIONS PRESENTED

The following substantial federal questions are presented:

A.

Is the petitioner deprived of her property without the due process of law guaranteed by the Federal Constitution, by a municipal zoning ordinance which forbids her to use her property except for a purpose for which it is admittedly unsuitable, when amending said ordinance to allow petitioner to use her property for the purposes for which it is most suitable would not affect the public health, safety, morals, or general welfare?

B.

Is the petitioner deprived of property without the due process of law guaranteed by the Federal Constitution, by the state court holding that rights incidental to her ownership of property are terminated by, or affected by, an eminent domain proceeding against her property, even though there has been no trial, jury verdict, judgment or payment in said eminent domain proceedings?

C.

Is the petitioner deprived of her property without the due process of law guaranteed by the Federal constitution, by the State Court's refusal to declare unconstitutional, the zoning ordinance affecting her property, the said Court's refusal being based on the proposition that mere passage of the ordinance by the city council is sufficient to show it is "fairly debatable" within the meaning of this Court's holding in Radice v. New York, 68 L. Ed. 690, 44 S. Ct. 325, 264, U. S. 292, and therefore the matter was not open to court review?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of the United States, having jurisdiction to bring before it the record of the proceedings in the Supreme Court of Florida in this cause and to review the decision and mandate issued by said Court, the petitioner relies on the following special and important reasons for this Court, in its sound judicial discretion, to exercise such jurisdiction and to grant such review:

A.

The Supreme Court of Florida, in answering Question III-A above in the negative, decided said question in a way not in accord with the decisions of this Court, including the cases of Pennsylvania Coal Co. v. Mahon, 43 S. Ct. 158, 260 U. S. 393, 67 L. Ed. 322; Pumpelly v. Green Bay & M. Canal Co. 113 Wall 166, 20 L. Ed. 557; Terrace v. Thompson, 263, U. S. 197, 68 L. Ed. 255, 44 S. Ct. 15; Euclid v. Ambler, 71 L. Ed. 303, 47 S. Ct. 114, 272 U. S. 365; Nectow v. City of Cambridge, 277 U. S. 183, 72 L. Ed. 842, 48 S. Ct. 447.

B.

The Supreme Court of Florida, in answering Question III-B above in the negative, decided said question in a way not in general accord with the decisions of this Court, including the cases of Garrison v. New York, 21 Wall (U. S.) 196, 22 L. Ed. 612; Terrace v. Thompson, 263 U. S. 197, 68 L. Ed. 255, 44 S. Ct. 15. The exact question presented, although involving a substantial question of federal constitutional law, has not heretofore been determined by this Court.

C.

The Supreme Court of Florida, in answering Question III-C above in the negative, misinterpreted and misapplied the rule established by this Court in the cases of Radice v. New York, 68 L. Ed. 690, 44 S. Ct. 325, 264 U. S. 292; and Euclid v. Ambler, 71 L. Ed. 303, 47 S. Ct. 114, 272 U. S. 365, by holding in effect that a City Council may be the final judge of the constitutionality of its own ordinances under the Federal constitution, contrary to the long-established holdings of this Court in such cases as Marbury v. Madison, 1 Cranch, (U. S.) 137, 2 L. Ed. 60.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Supreme Court of the State of Florida, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Supreme Court of the State of Florida had in the case numbered and entitled on its docket, No. 23414, "City of Miami Beach, a Florida municipal corporation, Petitioner, v. H. Gertrude Hogan, Respondent," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Supreme Court of the State of Florida be reversed by this Court; and for such further relief as to this Court may seem proper.

DATED June 18, 1953.

H. GERTRUDE HOGAN,
Petitioner,

By: _____
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1952

No._____

H. GERTRUDE HOGAN,

Petitioner
(Respondent below),

vs.

CITY OF MIAMI BEACH,

Respondent
(Petitioner below).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF COURT BELOW

The Supreme Court of Florida, in deciding this case, (See 63 So. 2nd 495), filed no written opinion. However, in its mandate in this case (R. p. 53), it stated that its decision was based "on the authority (of the companion case) of the City of Miami Beach v. Elsalto Real Estate, Inc., opinion filed this day." The said opinion is set forth in the Record herein at pages 42 to 45. It is reported in 63 So. 2nd 493. The said Elsalto case is similar to this

case, and these two cases were argued together in the Supreme Court of Florida. The Elsalto case is also before this Court on petition for certiorari.

II.

JURISDICTION

The statutory basis of this Court's jurisdiction herein is set forth in the preceding petition under II, which is hereby adopted and made a part of this brief.

III.

STATEMENT OF THE CASE

This has already been stated in the preceding petition under I, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS

POINT A. The Supreme Court of Florida erred in holding that City of Miami Beach Ordinance No. 289, forbidding petitioner to use her property for any purpose other than a single-family residence, for which purpose it was admittedly unsuitable, did not deprive petitioner of her property without due process of law, when permitting its use for other purposes for which it was suitable would not affect the public health, safety, morals or general welfare.

POINT B. The Supreme Court of Florida erred in holding that petitioner's right incidental to her ownership of property,—to-wit: her right to apply in court for a declaration of the unconstitutionality of the zoning of her property and to have it rezoned—was terminated by, or affected by, an eminent domain proceeding against her property, although there had been no trial, jury verdict, judgment or payment in said eminent domain proceeding. By so holding, the Supreme Court of Florida deprived petitioner of a property right without due process of law.

POINT C. The Supreme Court of Florida erred in refusing to hold said zoning ordinance unconstitutional, as to petitioner's property, giving as its reason, the erroneous proposition that mere passage of the ordinance by the City is sufficient to show it is "fairly debatable" within the meaning of this Court's holding in Radice v. New York, 68 L. Ed. 690, 44 S. Ct. 325, 264 U. S. 292, and therefore the matter was not open to court review.

V.

ARGUMENT

POINT A.

THE SUPREME COURT OF FLORIDA ERRED IN HOLDING THAT CITY OF MIAMI BEACH ORDINANCE NO. 289, FORBIDDING PETITIONER TO USE HER PROPERTY FOR ANY PURPOSE OTHER THAN A SINGLE-FAMILY RESIDENCE, FOR WHICH PURPOSE IT WAS ADMITTEDLY UNSUITABLE, DID NOT DEPRIVE PETITIONER OF HER PROPERTY WITHOUT DUE PROCESS OF

LAW, WHEN PERMITTING ITS USE FOR OTHER PURPOSES FOR WHICH IT WAS SUITABLE WOULD NOT AFFECT THE PUBLIC HEALTH, SAFETY, MORALS OR GENERAL WELFARE.

SUMMARY

The zoning ordinance permits petitioner to use her property only as a single family residence, with a minimum of 40,000 square feet lot area per family. The sworn complaint alleges that the property is unsuitable for, and not in demand for, said use, and that allowing it to be used for the use for which it is most suitable would not affect the public health, safety, morals or general welfare. These allegations are unanswered, and for the purpose of this proceeding must be taken to be true. Thus, the zoning ordinance arbitrarily prevents petitioner from using her property for any and all uses for which it may be suitable. Therefore, the zoning ordinance deprives petitioner of her property, without due process of law.

———o———

City of Miami Beach ordinance No. 289, placed petitioner's property in "RAA Estate District," (R. p. 5, 6) and required a minimum lot area of 40,000 square feet per family. (R. p. 6 and 20), Section 15. In "RAA Estate District", petitioner's land cannot be used "for any purpose other than a single-family residence, together with its accessory buildings." (R. p. 16, Section 3).

This is the highest and most restrictive classification in the ordinance. Indeed, we may presume it to be one of the highest and most restrictive zoning classifications in

the nation. Petitioner's property, (one lot 100 x 500 ft.) is approximately 50,000 square feet, (R. p. 4), equal to ten average size residential lots of 50 x 100 feet.

Petitioner alleges that her property is no longer suitable for, nor in demand for, such a use. (R. p. 7). This is a plain, simple statement of fact, and proof either supporting it or denying it could be introduced at a trial. However, there has not yet been a trial. Under Florida law, well-pleaded allegations of a complaint are admitted to be true on motion to dismiss. (Clements v. Roberts, 151 Fla. 669, 10 So. 2nd 425; Miller v. Security Peoples Trust Co., 142 Fla. 434, 195 So. 191, 129 A.L.R. 500; and many other Florida cases).

Therefore, we must consider it to be true that petitioner's property is unsuitable for the only purpose for which the ordinance permits her to use it. The word "Suitable" means "fit and appropriate for the end in view." Black's Law Dictionary, Third Edition, p. 1677, (citing U. S. v. American & Patterson, 9 Ct. Cust. App. 244, 245).

This syllogism leads to only one conclusion: The ordinance forbids petitioner to use her property, except for a purpose for which it is not fit or appropriate.

For constitutional purposes, the right to property is the right to use it. In Pennsylvania Coal Co. v. Mahon, 43 S. Ct. 158, 260 U. S. 393, 67 L. Ed 322, 28 A. L. R. 1321, it is said:

> "As said in a Pennsylvania case: 'For practical purposes, the right to coal consists in the right

> to mine it.' Com. ex rel. Keator v. Clearview Coal Co., 256 Pa. 328, 331, L.R.A. 1917E 672, 100 Atl. 820. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating it or destroying it. This we are warranted in assuming that the statute does."

See also Pumpelly v. Green Bay & M. Canal Co., 13 Wall 166, 20 L. Ed. 557; and Terrace v. Thompson, 263 U. S. 197, 68 L. Ed. 255, 44 S. Ct. 15.

Is it conceivable that the public health, safety, morals and general welfare of the people of the City of Miami Beach require that petitioner's property be used only for single-family residence purposes? No, it is not, for we find in the ordinance (R. p. 16, Section 3) that if the city itself owned this same property, it could use it for "parks, playgrounds, automobile parking areas, or municipal buildings, owned and operated by the City of Miami Beach." Thus, although the City permits plaintiff to use her land in a most highly restricted manner—to-wit, single-family residence, with a minimum of 40,000 square feet per family—the City itself, if it were the owner, could use the same land for the most public purposes possible—to-wit, parks, playgrounds, parking lots and municipal buildings.

In addition, petitioner alleged in her complaint, that the rezoning of her property to hotel uses "would have no effect or relation whatever upon or to the public safety, public health, morals of the community or the general

welfare." (R. p. 13). This allegation, too, must be taken to be true for the purposes of this proceeding.

The Supreme Court of the United States, in Nectow v. City of Cambridge, 277 U. S. 183, 72 L. Ed. 842, 48 S. Ct. 447, considered this exact question, and held precisely contrary to the holding of the Supreme Court of Florida in this case. In that case, this Court said:

> " * * * The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. Euclid v. Ambler Realty Co., supra, p. 395. Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case. That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the 14th Amendment and cannot be sustained.
>
> "Judgment reversed."

Thus, the zoning ordinance completely deprives petitioner of any and all use of her property for any purpose for which it is fit and appropriate, although the public health, safety, morals, or general welfare do not require such stringent regulation. For this reason, the ordinance is arbitrary and unreasonable, and deprives the petitioner of her property without due process of law, and the Supreme Court of Florida erred in not so holding.

POINT B.

THE SUPREME COURT OF FLORIDA ERRED IN HOLDING THAT PETITIONER'S RIGHT INCIDENTAL TO HER OWNERSHIP OF PROPERTY,—TO-WIT: HER RIGHT TO APPLY IN COURT FOR A DECLARATION OF THE UNCONSTITUTIONALITY OF THE ZONING OF HER PROPERTY AND TO HAVE IT REZONED — WAS TERMINATED BY, OR AFFECTED BY, AN EMINENT DOMAIN PROCEEDING AGAINST HER PROPERTY, ALTHOUGH THERE HAD BEEN NO TRIAL, JURY VERDICT, JUDGMENT OR PAYMENT IN SAID EMINENT DOMAIN PROCEEDING. BY SO HOLDING, THE SUPREME COURT OF FLORIDA DEPRIVED PETITIONER OF A PROPERTY RIGHT WITHOUT DUE PROCESS OF LAW.

SUMMARY

Prior to the initiation of the eminent domain proceedings against her property, petitioner had a right to apply in Court for, and to be granted, a judicial declaration that the zoning ordinance was unconstitutional, as

applied to her property. This right was a property right, incidental to and a part of her ownership of the property. At the time she did so apply in Court, by filing this action, the eminent domain proceedings had merely been filed, but there had been no trial, no jury verdict, no judgment, no payment. Without these things, an eminent domain proceeding in Florida is merely inchoate and cannot deprive the property owner of any right whatsoever in her property. In holding that this imperfect eminent domain proceeding terminated petitioner's right, or affected it in any way, the Supreme Court of Florida erred, in a way which deprived petitioner of her property without due process of law.

———o———

The eminent domain proceeding against petitioner's property was filed April 4, 1952. (R. p. 9.) This suit seeking a declaration that the zoning ordinance was unreasonable, arbitrary and unconstitutional as to petitioner's property, was filed April 29, 1952. (R. p. 3.) On the latter date, there had been no trial, jury verdict, judgment or payment — and, indeed, no service of process on petitioner — in said eminent domain proceeding. (R. p. 10.)

The "due process of law" by which a municipality may acquire private property in eminent domain proceedings is set forth in Chapter 73, Florida Statutes, 1951 (which is too lengthy to be quoted in full herein). Suffice it to say that said "due process of law" requires a jury trial, a jury verdict, a judgment by the Court, and payment of the compensation ascertained by the jury. Only upon the completion of all of these steps does the municipality obtain any interest in the property. Section 73.13, Florida Statutes, 1951, states:

> "The petitioner," (i. e., the municipality) "within ten days after the rendition of the judgment, shall pay into the Court for the use of the defendant, the compensation ascertained by the jury, **or else the proceedings shall be null and void,** unless, for good cause, further time, not exceeding thirty days, be allowed by the Court. Upon such payment, and upon the recording of the judgment, with the clerk's certificate that the compensation has been paid into the court, in the books of deeds in said clerk's office, the petitioner may enter upon and appropriate the property for the uses aforesaid, with the same effect as though the petitioner held the same by deed or grant from the defendant." (Emphasis added).

Thus, even assuming for the sake of argument, that the legality and necessity of the condemnation are unquestioned, innumerable eventualities may defeat or terminate the proceedings at any stage, and unless the proceedings are fully completed, including payment to the defendant, the proceedings are **null and void.**

In Hillsborough County v. Kensett, 107 Fla. 237, 144 So. 393, affirming 107 Fla. 237, 138 So. 400 (Florida, 1932), it is said:

> "Property unlawfully taken without compensation is not public property until it is paid for, or until the right to recover compensation for it is lost or abandoned, even though it has been devoted to the county benefit and is being used in the orderly administration of county government, such as for purposes of a highway and the like."

In Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (Florida, 1926), in which a statute allowing a taking by eminent domain prior to jury verdict was held unconstitutional, it is said:

> "The Constitution" (i. e., the Florida constitution) "secures the inalienable right of 'possessing and protecting property,' and provides that the right of trial by jury shall be secured to all and remain inviolate forever; 'no person shall be ***deprived of ***property without due process of law; nor shall private property be taken without just compensation;' and that 'all courts in this state shall be open, so that every person for any injury done him in his lands ***shall have remedy, by due course of law.' Declaration of Rights, Sections 4, 12.
>
> "These provisions secure individual rights against unconstitutional invasion by the state, as well as from violation by other governmental agencies and individuals."

"Due process of law," in this connection, is not an amorphous concept. It is spelled out in detail in the statute. Although it is conceivable that in another state a city might actually exercise possessory rights over land prior to completion of the condemnation proceedings, neither the City of Miami Beach nor the Supreme Court of Florida could deprive petitioner of any of her rights connected with her property prior to full completion of the eminent domain proceedings and full payment of the adjudged compensation, under Florida law.

In Garrison v. New York, 21 Wall. (U. S.) 196, 22 L. Ed. 612, this Court said:

> "Any declaration in the statute that the title will vest at a particular time, must be construed in subordination to the Constitution" (i. e., the constitution of New York), "which requires, except in cases of emergency admitting of no delay, the payment of the compensation, or provision for its payment, to precede the taking, or, at least, to be concurrent with it."

Any taking of any part of petitioner's rights in and to her property, without full completion of the eminent domain proceedings, deprives petitioner of property without due process of law. Petitioner's "property rights in the land include the right to use * * * it for lawful purposes." Terrace v. Thompson, 263 U. S. 197, 68 L. Ed. 255, 44 S. Ct. 15, and cases therein cited.

Petitioner believed her right to use her property for hotel uses was a lawful purpose. However, in order to so use it, it was necessary that she institute proceedings in court to establish the unconstitutionality of the ordinance forbidding such a use. That she had a right to institute such proceedings is established in the case of City of Miami Beach v. First Trust Co., (Fla., 1950) 45 So. 2nd 681, in which the owners of property adjacent to petitioner's property initiated, and were successful in, exactly such a proceeding. The right to initiate such a proceeding was one of petitioner's property rights, necessary to the use of her property. Allowing the incomplete eminent domain proceedings to impair or lessen that right deprived petitioner of property without due process of law.

That the Supreme Court of Florida did allow the mere existence of the eminent domain proceeding to influence its decision to dismiss petitioner's complaint, is shown on the face of its opinion. (R. p. 43-45). The Supreme Court of Florida held, in effect, that it was inequitable for petitioner to complain of the unconstitutionality of an ordinance which affected her property, if the city had merely indicated its intention to take the property from her.

By so holding, the Supreme Court of Florida erred, and deprived petitioner of her property without due process of law.

POINT C.

THE SUPREME COURT OF FLORIDA ERRED IN REFUSING TO HOLD SAID ZONING ORDINANCE UNCONSTITUTIONAL, AS TO PETITIONER'S PROPERTY, GIVING AS ITS REASON THE ERRONEOUS PROPOSITION THAT MERE PASSAGE OF THE ORDINANCE BY THE CITY IS SUFFICIENT TO SHOW IT IS "FAIRLY DEBATABLE" WITHIN THE MEANING OF THIS COURT'S HOLDING IN RADICE V. NEW YORK, 68 L. ED. 690, 44 S. CT. 325, 264 U. S. 292, AND THEREFORE THE MATTER WAS NOT OPEN TO COURT REVIEW.

SUMMARY

This Court has laid down what may be called the "fairly debatable" rule in cases concerned with police power ordinances and statutes. This rule holds that where

the constitutional validity of a statute or ordinance depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The Supreme Court of Florida misconstrued this rule, by interpreting it to mean that the mere fact that the legislature adopted the act, and has refused to change it, is sufficient to show that it is "fairly debatable", and a court cannot substitute its judgment on the constitutional question for that of the city officials. By so doing, the court deprived petitioner of all means of enforcing her constitutional rights by judicial proceedings, and abdicated its constitutional duty of passing on the constitutionality of city ordinances.

———o———

The "fairly debatable" rule was laid down by this Court in Radice v. New York, 68 L. Ed. 690, 44 S. Ct. 325, 264, U. S. 292, where it is said:

> "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker."

Let us here make an analysis of this Radice rule. It breaks down into three steps: (Quotations are from the Radice opinion.)

1. The legislative inquiry into facts—"The legislature had before it a mass of information." Thus, the legislature did not act arbitrarily, but based its action on facts.

2. The legislative conclusion of what the facts establish— "from . . . which it concluded that night work is substantially and especially detrimental to the health of women." Thus, the legislature did not act unreasonably, but reached a reasoned conclusion.

3. The decision of the legislature to exercise its police power—the night work was "sufficiently detrimental . . . to justify its suppression."

It is to be observed that the Court inquired into, and had before it, evidence and argument on all three of these phases. It could have declared the statute unconstitutional in any one of these phases, i. e.:

1. If the legislature acted arbitrarily or capriciously, with no basis of facts whatever;

2. If the legislature acted unreasonably, drawing a patently false conclusion from the facts; or

3. If the legislature exceeded its constitutional power, by passing a law not justified by its own facts and conclusions (for instance, if it had passed a law forbidding all work by women).

All these phases are subject to court review. The mere fact that the legislature has acted does not guarantee that its act is automatically constitutional.

This Court referred to this rule again in the leading zoning case of Euclid v. Ambler, 71 L. Ed. 303, 47 S. Ct. 114, 272 U. S. 365. In that case, although upholding the zoning ordinance as a whole, it clearly recognized its duty to declare particular provisions of such ordinances unconstitutional, if called upon to do so, saying:

> "It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable."

In the case at bar, however, the Supreme Court of Florida holds that the "fairly debatable" rule absolves it from all duty to review the constitutionality of this ordinance. Its error arises from its failure to observe that this Court in the Radice case, did not flatly refuse to review the statute, but, rather, reviewed it and found it to be constitutional. Because of this failure of the Florida Court, it abbreviates and renders completely meaningless, the rule of the Radice case.

Although the attempt of the Supreme Court of Florida to state and apply the Radice rule to the case at bar is obscured by confusion and ambiguity (R. p. 43, 44), it is clear that the manner of its application to this case, at this stage of the proceedings, allows no opportunity whatever for the petitioner or any other person in Florida, ever to obtain a judicial determination of the constitutionality of a zoning ordinance.

At this time, the record in the case includes only allegations made by the petitioner. There has been no answer by the city, and no evidence introduced by the city. The petitioner has alleged that her property is not suitable for the only purpose for which the ordinance allows her to use it, (R. p. 7), that its use for other purposes will not affect the public health, safety, morals or general welfare, (R. p. 13), and that the present zoning of her property is therefore arbitrary, unreasonable, confiscatory and contrary to the provisions of the State and Federal constitutions. (R. p. 25). To these allegations, the city has made no denial or answer of any kind. The city has merely moved to dismiss the complaint. For aught that the record shows, the city will admit every one of these allegations, and, in fact, for the purpose of the present proceedings, these allegations must be deemed to be admitted.

How, then, can the Supreme Court of Florida justify its assumption that "the matter is 'fairly debatable'"? (R. p. 44). We can only conclude that the mere fact that the City Council had adopted the ordinance and that it had refused petitioner's application for rezoning was deemed by the Supreme Court of Florida to be sufficient to show that "the matter is 'fairly debatable'." This can only mean that all decisions of a city council on zoning matters are automatically constitutional and cannot be reviewed by the judiciary. Indeed, the Supreme Court of Florida appears to think such a situation desirable. (R. p. 45).

Such a holding reduces the doctrine of the Radice case and the Ambler case to an absurdity, and places the court in a position of refusing to effectuate the provisions

of the federal constitution. This danger was clearly foreseen and warned against by Chief Justice Marshall in Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. Ed. 60, and by many other opinions by this Court.

So serious an abnegation of a constitutional function by a state court, and so serious a misinterpretation of an important rule laid down by this Court, clearly call for an exercise of this Court's jurisdiction and a reversal of the decision of the Supreme Court of Florida.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

CARL T. HOFFMAN,
Counsel for Petitioner

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SUPREME COURT OF THE UNITED STATES

October Term, 1953

No. 132

H. GERTRUDE HOGAN,

Petitioner,
(Respondent below),

-vs.-

CITY OF MIAMI BEACH,
a municipal corporation created and organized under the laws of the State of Florida,

Respondent.
(Petitioner below).

BRIEF OF THE RESPONDENT CITY OF MIAMI BEACH

STATEMENT OF THE CASE

We consider the "statement of the matter involved" appearing in the Petition and the "preliminary statement" appearing in Petitioner's Brief to be wholly insufficient and believe that the case may be concisely and properly stated as follows:

The legislature of the State of Florida incorporated the City of Miami Beach on May 25, 1917 by Special Act. (1). The Act granted the City the power of eminent domain. (2).

In the exercise of this power the City by resolution of its Council, adopted April 4, 1952 (R-23-24), declared it to be necessary for the City of Miami Beach to acquire for park purposes certain lands situate within the City known as Lots 6, 7, 8 and 9 of Indian Beach Corporation Subdivision and directed the City Attorney to institute condemnation proceedings therefor. (R-24).

Acting accordingly, the City Attorney on April 4, 1952, filed, on the Law side of the Circuit Court of Dade County, Florida, the petition of the City of Miami Beach seeking the condemnation of the described land for park purposes. (R-10).

Thereafter, on April 29, 1952, the petitioner herein, H. Gertrude Hogan, the owner of Lot 6 above mentioned, filed her Bill of Complaint on the Equity side of the same Court wherein she prayed:

(1) That the zoning ordinance of the City of Miami Beach (adopted December 3, 1930), which restricted petitioner's property to "RAA" (single family estate) Use be declared to be invalid and unconstitutional. (2) That

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(1) Chapter 7672, Special Acts, 1917, Laws of Florida.

(2) "The City of Miami Beach shall have power:

(a) . . . to acquire property for park purposes . . .

(b) To exercise the right of eminent domain and by virtue thereof to acquire title to or rights of way in property within the territorial limits of said City for any of the foregoing purposes." Chapter 7672, Special Acts, 1917, Laws of Florida, as amended by Chapter 13101, Special Acts 1927, Laws of Florida.

the condemnation proceedings be stayed pending the progress of petitioner's suit, and (3) That the respondent, City of Miami Beach, be thereafter permanently restrained from seeking to condemn petitioner's property. (R-14).

Thereafter, on July 24, 1952, the respondent, City of Miami Beach, filed its Motion to Dismiss the Bill of Complaint on various grounds, including the following: (1) That the Bill of Complaint did not state a claim upon which relief could be granted, and (2) That the bill of Complaint affirmatively showed that it was filed subsequent to the institution of the condemnation proceedings brought by the City. (R-28-29).

Thereafter, by Orders dated July 25, 1952 and July 28, 1952, respectively, the Dade County Circuit Court denied the City's Motion to Dismiss and enjoined all further proceedings in the condemnation proceedings pending final determination of the Petitioner's Bill of Complaint. (R-29-30).

Thereafter, the respondent, City of Miami Beach, filed its Petition for Writ of Certiorari to the Supreme Court of Florida wherein it complained that the Order denying its Motion to Dismiss and the Order staying the proceedings in the condemnation suit were erroneous and assigned various reasons therefor, including the assertion that the Bill of Complaint would not lie because an owner cannot, subsequent to the institution of condemnation proceedings by a Governmental unit, maintain such a suit where, for the first time, complaint is made of zoning restrictions. (R-1-2).

Thereafter, on January 27, 1953, the Supreme Court

of Florida granted Certiorari; reviewed the record; rendered its Opinion and Judgment (R-42-45, inclusive); denied petitioner's Petition for Rehearing (R-52), and issued its mandate to Dade County Circuit Court, directing that the Orders denying Respondent's Motion to Dismiss and Granting the Stay Order be vacated and set aside. (R-53).

ARGUMENT

The petitioner does not contend that the City of Miami Beach lacks the power of eminent domain.

Her Bill of Complaint asserts, however, that she is entitled to enjoin the prosecution of the condemnation proceedings instituted by the City because her property is not properly zoned.

The Supreme Court of Florida has held that her complaint about the zoning of her property made only after the City had commenced condemnation proceedings, came too late, and that the City could not be enjoined from continuing the condemnation proceedings merely to afford the petitioner an opportunity to litigate the reasonableness of the zoning restrictions applicable to her property.

This determination by the Florida Supreme Court, she contends, denies her the equal protection of the law, and deprives her of property without due process in violation of the 14th Amendment.

This contention is not sustained by the record.

The record shows that the City adopted its comprehensive zoning Ordinance in December, 1930. (R-5).

Under its provisions the petitioner's property has always been and is now restricted to "Single Family Estate" use.

The petitioner has maintained improvements upon this property described in her Bill as a "large private residence, a swimming pool, a cabana house, a large tile, landscaped and completely enclosed patio, a five-car garage building and servants' quarters, comprising in the aggregate, a dwelling establishment consisting of more than fifty separate rooms including eleven bathrooms." (R-5).

This Zoning Ordinance provides two separate remedies for persons deeming themselves aggrieved by the application of the Ordinance to their property, namely, by application to the City Council for a change of zoning, or by application to the Zoning Board of Adjustment for a variance from the strict letter of the Ordinance.

The petitioner at no time found any fault with the zoning applicable to her property prior to the institution of condemnation proceedings by the City on April 4, 1952.

The first complaint she made was on April 29, 1952, when she filed her Bill of Complaint in the Dade County Circuit Court. It was not until July 23, 1952, after the City had moved to dismiss her Bill, that she applied to the City Council for a change of zoning. (R-27-28). She has yet to make any application to the Zoning Board of Adjustment for the grant of a variance. It is obvious, therefore, she has at all times enjoyed the use of her property under the applicable zoning and has at no time evinced the slightest desire or intent to use her property

for hotels or apartments as would be permitted under the more liberal "R E Multiple Family" classification now sought by her.

The sole purpose of her suit is to make the most she can from the taking of her property, for she asserts in her Bill that the City is attempting "to acquire plaintiff's property at a price far below its true value." (R-12).

However, there is no allegation, or any complaint made that the laws of Florida do not afford the petitioner every opportunity to be heard judicially on the amount of compensation to which she will be entitled (**Georgia v. Chattanooga,** 264 U.S. 472, 44 S. Ct. 360).

It is settled by this Court that the final judgment of a State Court "ought not to be held in violation of the due process of law enjoined by the 14th Amendment unless by the rulings upon questions of law the (petitioner is) prevented from obtaining substantially any compensation."

Chicago B. & Q. Rwy. v. Chicago, 166 U.S. 226, 17 S. Ct. 581,

McGovern v. New York, 229 U.S. 363, 33 S. Ct. 876.

The Supreme Court of Florida having determined that the complaint of improper zoning came too late, this left only the allegations of bad faith and lack of necessity to serve as a basis for enjoining the condemnation suit, and the State Court has expressly pointed out that the petitioner may litigate these issues in the condemnation suit.

This determination by the Supreme Court of Florida follows the rule of this Court, that equity will not enjoin condemnation proceedings where the plaintiff has an adequate remedy at law **(Osborne vs. Missouri Pacific Railway Co.,** 147 U.S. 248, 13 S. Ct. 299).

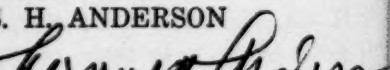
At all events, the decision of the highest Court in Florida on that question must be followed by this Court; **Southern Railway Co. v. City of Durham,** 266 U.S. 178 45 S. Ct. 51; and consequently the judgment below may be deemed to rest upon an adequate and sufficient non-federal ground, **Vandalia Railroad Co. v. Indiana,** 207 U.S. 359, 28 S. Ct. 130; **Herb v. Pitcairn,** 324 U.S. 117, 65 S. Ct. 459.

In view of the determination by the Florida Supreme Court that the petitioner was not entitled to an injunction, it is unnecessary to determine the sufficiency of that phase of the Bill which attacks the validity of the Zoning Ordinance as it applies to Petitioner's property. At all events, it was for the State Court to say whether this phase of the Bill was sufficient, under the rules of pleading obtaining in Florida. **(Washington v. Miller,** 235 U.S. 422, 35 S. Ct. 119; **United States v. Pink,** 315 U.S. 203, 62 S. Ct. 552).

In conclusion, if by any chance the State Courts should, in the trial of the condemnation proceedings, deny the petitioner a federal right, the appropriate and adequate remedy by review in this Court is obviously available. **(Cavanagh v. Looney,** 248 U.S. 453, 39 S. Ct. 142).

Respectfuly submitted,

BEN SHEPARD and
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Supreme Court of the United States

October Term, 1953

No. 132

H. GERTRUDE HOGAN,
Petitioner,
(Respondent below)

vs.

CITY OF MIAMI BEACH,
a municipal corporation
created and organized
under the laws of the
State of Florida,
Respondent.
(Petitioner below)

REPLY BRIEF OF PETITIONER

The Brief of the Respondent, City of Miami Beach, makes no attempt to controvert the very serious constitutional questions raised by petitioner in her petition and brief. The respondent merely attempts to persuade this Court not to exercise its jurisdiction over these serious questions, using as its sole argument, in the final analysis, this statement appearing on page 7 of its brief:

> " . . . consequently the judgment below may be deemed to rest upon an adequate and sufficient non-federal ground."

This is, at best, a nebulous and somewhat evasive statement, since it is difficult to determine just what this supposedly non-federal ground is.

However, on page 4 of the respondent's brief, it states what it conceives to be the basic ground on which the decision of the Supreme Court of Florida rests, saying:

> "The Supreme Court of Florida has held that her complaint about the zoning of her property made only after the City had commenced condemnation proceedings, came too late, . . . "

That this holding of the Supreme Court of Florida is considered the primary and indispensable basis of that Court's decision, by the respondent itself, is again emphasized in its brief, on page 6, where it says:

> "The Supreme Court of Florida **having determined that the complaint of improper zoning came too late,** this left only the allegations of bad faith and lack of necessity to serve as a basis for enjoining the condemnation suit. . . ." (Emphasis added)

In other words, respondent concedes that the Supreme Court of Florida could not have reached the decision it did reach without first deciding that the mere institution of the condemnation proceeding, even prior to jury trial, jury verdict, judgment or payment, destroyed petitioner's right to complain of the unconstitutionality of the zoning ordinance.

It is precisely this holding of the Florida Supreme Court which deprives petitioner of a property right without the due process of law guaranteed by the Federal constitution (see petitioner's brief, pp. 18-23). The Florida statutes spell out in detail the "due process of law" required in an eminent domain proceeding. The Federal constitution guarantees that petitioner cannot be deprived of her property without that due process. Therefore, the Florida Supreme Court's holding that an eminent domain proceeding, which has not carried out that due process, nevertheless cuts off some of petitioner's property rights, directly violates the Federal constitution.

Respondent's brief makes no attempt to answer this simple and logical argument. Instead, it treats this basic, unconstitutional holding of the Florida court as a **fait accompli**, beyond the power of this Court to alter. The novel theory running through respondent's brief is: Since this question has already been decided by the state court, it is, therefore, non-federal. The rationale of its argument is like this:

1. The Florida court has decided that the zoning suit was filed too late, because the condemnation suit was filed first;

2. Without the zoning question, there is no federal ground left;

3. Therefore, this Court has no jurisdiction.

This type of argument is "begging the question" in

a peculiarly transparent manner. In effect, respondent tells this Court: Assuming that the basic premise of the Florida court is correct, there is nothing wrong with its conclusion.

By means of this stroke of illogicalness, respondent avoids completely the constitutional questions raised in petitioner's brief. This evasive type of argument will not deceive this Court.

Petitioner has no desire to attack the irrelevant dicta of the Florida court, which occupy a large portion of its opinion. Petitioner is, rather, attacking the basic holding of that court, for by that holding petitioner is being deprived of property without due process of law, contrary to the provisions of the Federal constitution.

If the Florida Supreme Court had considered petitioner's zoning complaint, instead of dismissing it on the unconstitutional grounds that her right to file it was extinguished by the mere filing of the condemnation suit, there can be no doubt whatsoever that petitioner's complaint stated an equitable cause of action.

Petitioner's complaint stated that her property was zoned for a purpose for which it was unsuitable; that she was injured thereby; that changing the zoning would not affect the public health, safety, morals or general welfare; and that she had exhausted her administrative remendies. To this complaint there has been no denial or answer of any kind. This complaint could be dismissed only by a complete abdication of judicial jurisdiction over

the constitutionality of zoning ordinances. In its opinion, the Supreme Court of Florida has, in fact, proclaimed its abdication of such jurisdiction. (R-44-45, and petitioner's brief, pp. 23-28). Such an abdication of constitutional duties goes far beyond a mere question of local practice, as respondent suggests.

This Court cannot sustain the abdication of jurisdiction announced by the Florida court, without subjecting the due process clause of the Federal constitution to the whim of every municipal governing body in the country.

The questions presented in the Petition for Certiorari in this case are Federal constitutional questions of far-reaching importance and merit full consideration by the Supreme Court of the United States.

Respectfully submitted,

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APPENDATORY NOTE:

Since filing our petition and brief herein, we have been advised by the Clerk of the Supreme Court of Florida and by West Publishing Co., that in the opinions of the Supreme Court of Florida originally issued in the cases of City of Miami Beach v. Hogan, and City of Miami Beach v. Elsalto Real Estate, Inc., the captions of the cases were inadvertently reversed. This error in captions was repeated in the Southern Reporter advance sheets, 63 So. 2nd 493 and 495.

This error has now been corrected in the files of the Supreme Court of Florida and in the bound volume of the Southern Reporter.

Therefore, the opinion of the Supreme Court of Florida, which appears at pages 42 to 45 in the record herein, is actually the opinion of the Supreme Court of Florida in the Hogan case, and the record is correct. However, the statement made on page 12 of our brief in support of the petition should now be corrected to conform with the correction made by the Supreme Court of Florida.

Two minor errors still appear in the reports of these cases in the bound volume, 63 So. 2nd, pp. 493 and 495, to-wit: the names of the attorneys are reversed, since Hoffman, Kemper & Johnson were attorneys in the Hogan case, and Grady C. Harris was attorney in the Elsalto case; and the date rehearing was denied in the Elsalto case was March 26, 1953, not February 10, 1953.

End